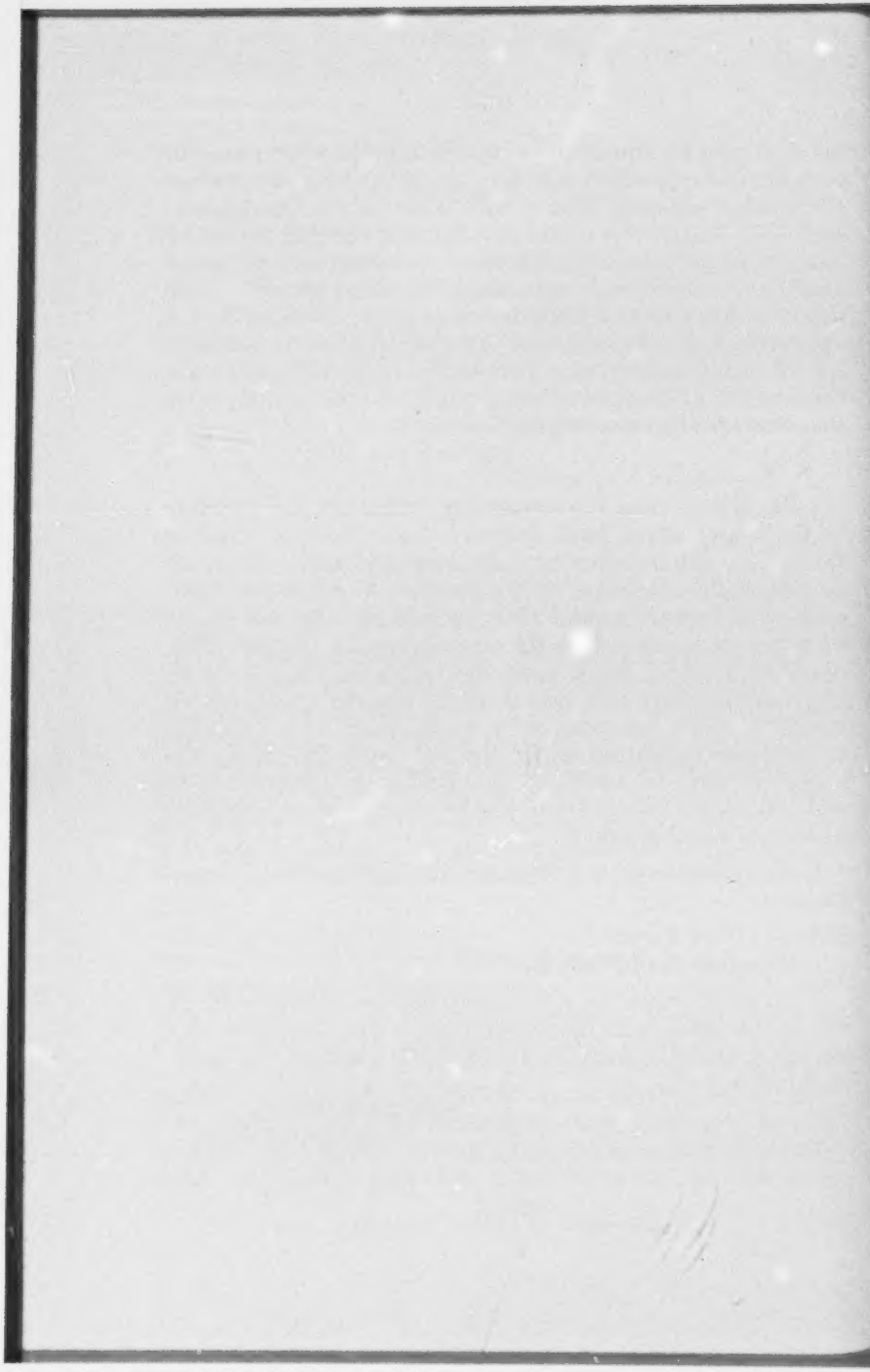

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 916

FRANK L. WEIL, WILLIAM E. RUSSELL and RAYMOND J. SCULLY, as Trustees under a declaration of trust dated April 7th, 1936 and a plan of reorganization of Series C-2 mortgage investments approved by an order of the Supreme Court of the State of New York entered on the 16th day of January, 1936,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

BRIEF OF THE MORTGAGE CORPORATION OF NEW YORK, *AMICUS CURIAE*, FILED IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

HAROLD L. SMITH,
JOHN F. CASKEY,
Attorneys for The Mortgage Corporation of New York, amicus curiae.

CURTISS ELY FRANK,
RICHARD B. DARRAGH,
Of Counsel.

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OCTOBER TERM, 1940.

FRANK L. WEIL, WILLIAM E. RUSSELL and RAYMOND J. SCULLY, as trustees under a declaration of trust dated April 7, 1936 and a plan of reorganization of Series C-2 mortgage investments approved by an order of the Supreme Court of the State of New York entered on the 16th day of January, 1936,

Petitioners,

against

THE UNITED STATES OF AMERICA.

No. 916

BRIEF OF THE MORTGAGE CORPORATION OF NEW YORK, *AMICUS CURIAE*

This brief is submitted (with the written consent of the petitioners and of the Solicitor General of the United States) on behalf of The Mortgage Corporation of New York, *amicus curiae,* in support of a petition in the above entitled action filed by petitioners hereinabove named for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Mortgage Corporation of New York was organized by the Superintendent of Insurance of the State of New York in August, 1933, at the time he took over Bond and Mortgage Guarantee Company in rehabilitation, as part of a plan approved by the New York Supreme Court

for the administration of approximately $300,000,000 of certificated mortgages then under guarantee by the latter company. All of the stock of The Mortgage Corporation of New York was issued to the Superintendent of Insurance as rehabilitator of Bond and Mortgage Guarantee Company and is now held by him as liquidator of such company.

The Mortgage Corporation of New York is presently trustee of a large number of certificated mortgages securing corporate bonds which in all probability will be subject to tax if the decision of the United States Circuit Court of Appeals in the above entitled action remains in full force and effect. The bonds involved in the instant action are corporate bonds originally guaranteed by New York Title and Mortgage Company, a company engaged in the same kind of business as was Bond and Mortgage Guarantee Company, and were ultimately assigned to the petitioners as trustees. In the case of The Mortgage Corporation of New York, the bonds were originally guaranteed by Bond and Mortgage Guarantee Company and were ultimately assigned to The Mortgage Corporation of New York as trustee.

We shall not attempt to duplicate the material contained in the brief of petitioners, which adequately sets forth the reasons for granting a writ of certiorari herein. We simply wish to emphasize the importance of the problem presented by this litigation. The action brought by petitioners for refund of the tax was in the nature of a test case. Altogether, in metropolitan New York City alone, there are close to $1,000,000,000 of corporate bonds secured by certificated mortgages, with respect to which the tax on the transfer to trustees is or may be controlled by the final decision in this

case (N. Y. L. 1933, c. 745; p. 32 of petition for writ of certiorari and brief).

We agree with petitioners that (1) the Circuit Court of Appeals for the Second Circuit has decided an important question of federal law which has not been, but should be, settled by this court, (2) the decision of the Circuit Court of Appeals for the Second Circuit in this case is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *United States* v. *Merchants Nat. Trust & Savings Bank,* 101 F. (2d) 399 (9th Cir.), and (3) the Circuit Court of Appeals for the Second Circuit has decided a federal question in conflict with applicable decisions of this court concerning the controlling effect of State law. *Terminals & Transportation Corp.* v. *State of N. Y.,* 169 Misc. 703, 8 N. Y. S. (2d) 282, aff'd 257 App. Div. 1028, 14 N. Y. S. (2d) 493, motion for leave to appeal denied 281 N. Y. 889 #23; *Electric Bond & Share Co.* v. *State of N. Y.,* 249 App. Div. 371, aff'd 274 N. Y. 625; *Rockefeller Foundation* v. *State of N. Y.,* 144 Misc. 460, 258 N. Y. Supp. 812; *Lang* v. *Commissioner,* 304 U. S. 264, 267; *Blair* v. *Commissioner,* 300 U. S. 5, 9, 10; *Freuler* v. *Helvering,* 291 U. S. 35, 45; *United States* v. *Merchants Nat. Trust & Savings Bank,* 101 F. (2d) 399, 401 (9th Cir.); *Dayton & Michigan R. Co.* v. *Commissioner,* 112 F. (2d) 627 (4th Cir.).

We submit that the transfers here in question, which resulted directly from the failure of the mortgage guaranty companies in New York and were required under the statutory system created by the Legislature of the State of New York to salvage the investments of hundreds of thousands of persons in certificated mortgages, were not the result of "voluntary acts" of the certificate holders. We believe that

if the petition for writ of certiorari is granted, a full consideration of the circumstances will conclusively demonstrate that the transfers in question were in every real sense transfers resulting wholly by operation of law and hence not subject to tax (Article 35(r) of Treasury Regulations 71).

We further submit that the transfers were in substance from the name of a resigned trustee (Mortgage Commission of the State of New York, which was created and terminated by statute) to the name of a substituted trustee (petitioners) appointed in accordance with the terms of the original trust agreement (the statutes creating the trusts), and hence were transfers resulting wholly by operation of law and not subject to tax (Article 35(h) Treasury Regulations 71). *Matter of New York Title & Mortgage Co.*, (Series C-2, etc.), 257 App. Div. 19 (motion to dismiss appeal granted 281 N. Y. 829), where the court said (p. 25):

> "The powers possessed by the trustees, however, could not be greater than those which the Schackno Act permitted them to have, for they are purely statutory trustees."

In *Weil* v. *President, etc. of Manhattan Co.*, 275 N. Y. 238, the court held that petitioners are "purely statutory trustees possessing only such power and authority as is conferred upon them by statute [the Schackno Act]". See also *Mittlemann* v. *President, etc. of Manhattan Co.*, 248 App. Div. 79, aff'd 272 N. Y. 632; *Rabinowitz* v. *President and Directors of the Manhattan Co.*, 275 N. Y. 453; *Hurdman* v. *Kelly*, 254 App. Div. 368.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

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